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A Truth About Career Law Clerks

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A TRUTH ABOUT CAREER LAW CLERKS

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I want to begin by thanking my colleague, Chad Oldfather, and also Todd Peppers, for organizing this conference. It is an impressive feat, and I would be grateful, as dean, even if it did not present me an opportunity to unburden myself of a point that has been bothering me for some time.

Let me begin that unburdening with an apology of sorts—or a refusal to give one, depending on how you look at it. It is best presented, perhaps, in a brief story. A number of years ago, one of my friends, a nationally acclaimed law professor, asked me, "If you were a Supreme Court Justice, how would you select your law clerks?" My response was that, whatever else might be the case, I would not hand the matter over, even for screening purposes, to some panel of former clerks, professors, or judges. I may have briefly elaborated on the basis for my view, which included that judges were, after all, appointed to make decisions. My colleague was a bit taken aback, as I recall; he expressed surprise that my answer had included a moralistic component of sorts, whereas his interest in asking the question was to figure out the most *efficient* way of going about the matter. I made no apology for relying, in part, on values other than efficiency.

The same is true today. My interest in the topic of law clerk selection has scarcely lessened during the intervening twenty years. To be sure, it has become less personal or at any rate less self-interested, as somewhere soon after that conversation I received a Supreme Court clerkship, and I would never again be in the business of seeking a clerkship. At the same time, as a law professor and, for more than a decade now, dean of a law school, I have had an intense interest in helping our students secure clerkships. And I admit to being frustrated at times because it seems to me that judges are placing too high a premium on efficiency.

Let me be more specific. The rise in the incidence of career law

* Dean and Professor of Law, Marquette University. This is a lightly edited version of remarks delivered at Marquette University Law School's conference, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*, held on April 11–12, 2014.

clerks—or even just long-term ones—is one that troubles me and, I respectfully submit, *should* trouble others in the profession, including judges. I say this with some embarrassment, not because I was ever a career law clerk, but because I have known both some very good judges with career law clerks and some very good career law clerks. In fact, I benefited personally, some twenty-five years ago, as a one-year law clerk for a judge of the U.S. Court of Appeals for the Ninth Circuit, from the counsel and assistance that I sought and received from a career law clerk to another Ninth Circuit judge in the same building. He was quite helpful to me during the year.

So perhaps my remarks will come off even as hypocritical, given this experience of mine (and my disclosure of it), but I do not think so. After all, I have never been a judge and never hired career law clerks. Thus, the more likely problem for my assessment is that it will seem naïve or inexperienced. I am willing to run that risk. After all, I served as a law clerk for two different judges, I have worked as an appellate lawyer, and my work as a law professor has included study of the courts. I do not include my work as dean in that catalogue because I appreciate that it does not add much on this particular experience or expertise front. In all events, I do not claim here to have, with respect to career law clerks, "the Truth" (with a definite article and a capital *T*), but I do offer something that seems to me "a truth."

And that small-*t* truth, in my estimation, is that the profession and the larger society are not receiving a net benefit from the rise in the incidence of career law clerks, as my impression is (in fact, I have no doubt concerning the general incidence, even though I do not have precise data).[1] Or, at a minimum, the truth is that the cost side of the cost/benefit equation of this phenomenon is significant. We can

1. With respect to the incidence, for example, the *National Law Journal*, citing figures compiled by the Administrative Office of the U.S. Courts, noted in 2007 as follows: "A decade ago there were 769 career law clerks, with a total annual salary cost of $55 million. The number by the last budget had doubled to 1,514 career clerks at a cost of $159 million . . . ." Pamela A. MacLean, *Report Calls for Limiting Career Law Clerks: Cost-Cutting Proposal Draws Ire of the Bench*, NAT'L L.J., Sept. 3, 2007, at 4. Against that backdrop, the Judicial Conference of the United States in 2007 limited each federal judge to one "career law clerk," a term referring to a clerk expected to serve more than four years. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 24–26 (2007) [hereinafter JUDICIAL CONFERENCE], *archived at* http://perma.cc/7V4K-D5TM. In these circumstances, at least the rate of growth in the incidence of career law clerks presumably has slowed down since 2007. To be sure, this does not speak to state appellate and supreme court judges—and there, too, my impression is that there has been a growth in the incidence of career law clerks, without the superintendence of an entity such as the Administrative Office or the Judicial Conference.

stipulate that an experienced clerk enables a judge to discharge his or her work more efficiently.[2] We can agree as well that in some important respects a law clerk early in a clerkship is less valuable to the judge than at some later point.

Yet none of this seems to me enough. To the latter point: it is possible to gain the benefits of some experience without hiring people for an indefinite term. My impression long was that federal appellate judges typically would hire law clerks for a one-year term but federal trial judges would appoint clerks to serve *two* years. The sorts of things that a district court law clerk does, it has seemed to me, resemble somewhat less the work of a student in law school than do the duties of the appellate clerk, so the difference helps justify the varying approaches.

Some of my unhappiness has to do with the awkwardness of the matter. I recall a few years ago attending a bar association event here in Milwaukee. The longtime law clerk to a longtime federal judge was receiving an award. I had no objection to the award (and little standing even if I had had one)—about which I am glad because the same organization gave me an award the day before this conference. Nor did the award on its face seem embarrassing from my perspective. Organizations give awards for any variety of reasons, and bar associations surely do well to include less prominent individuals in their bestowal. Yet it was, well, awkward when in accepting the award the law clerk commended the judge—itself an appropriate thing—not just for hiring the clerk or being a great boss generally but also, more specifically, for getting out of the way so that the clerk and others in the chambers could get the work done. My concern was not that the statement was untrue; my concern was that it was *true*—both that the judge had so proceeded and that the law clerk thought this to be an appropriate and praiseworthy approach.

Yet my concern encompasses more than embarrassment for others. In my estimation, there is a professional service aspect of a judge's work with law clerks that necessarily suffers to the extent that a judge works with a career law clerk. Indeed, to *that* extent, this aspect of the work ceases to exist, by definition. The career law clerk is not being groomed for some other service to the society; he or she will represent no clients in that court or any other; such clerks will do nothing *as lawyers* except to serve as law clerks. By contrast, the clerk who has worked at the

2. Of course, this is to leave aside the larger direct economic costs of career law clerks, borne not by an individual judge but by the taxpayers.

judge's elbow for a year or two will take that training to the next position in the legal profession, likely as a practicing lawyer and sometimes eventually as a judge. The profession and the common good will be advanced.

This is not the totality of the contribution that limiting the length of tenure of law clerks can make. There is such a thing as new learning in the law—new techniques, new decisions, even new laws. One would rather imagine that at least the best students coming from at least some law schools are at least exposed to such newness—not that they have become experts in the process. This seems to me another reason that a failure to make room for new law school graduates reduces the social good. We cannot doubt, at any rate, that the views of the longtime law clerk and the judge will converge over the course of time, a phenomenon that itself has costs.

I do not wish to suggest that judges can serve the purpose of developing new lawyers only by hiring new law graduates as clerks. I certainly have appreciated the value of judicial internship programs, both generally and in the case of Marquette Law School. Indeed, I am seeking to be especially careful here because, while I am disappointed by the *law-clerk* hiring practices of some judges in Wisconsin, some of these same judges are among the many who contribute to Marquette University Law School and the future of the legal profession by accepting into their chambers and their professional lives—and the lives of their law clerks—one or more Marquette law students each semester doing a part-time internship. For all this, I am very grateful.

On the career law clerk front, I may have the bottom line wrong, and I have already suggested that I am not in possession of "the Truth" on this point. Nor have I indulged myself in some of the broader musings possible. For example, when I think about the whole judicial staff phenomenon, I recall the early-nineteenth-century judges and justices who rode a circuit, slept in a tavern, and held court wherever they could find the space (also sometimes in a tavern).[3] They ran their courts and did justice, in the process requiring the presence only of a clerk of court, as I understand it (because the presence of a clerk helps turn the "judge" into the "court").[4] I am not sure that we've gotten more or

3. *See generally* Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003).

4. Cf. *Rubin v. State*, 192 Wis. 1, 211 N.W. 926 (1927), where the Wisconsin Supreme Court explained (in the contempt-of-court context) as follows:

> The Judge and the Court are not identical. The Judge is a man. The Court is an

better justice proportionate to the increased expense and bother since those days. Yet this would not be a good point for me to make, or at least to dwell upon. The typical law school dean—even one, such as I, who continues to teach—has enough assistant and associate deans that he is glad not to find himself ever face-to-face with the comparatively lonely law school dean of a century ago. More generally, the growth of administrative apparatus has scarcely been confined to the judiciary or the academy. More personally yet, there is also the fact that I am hardly confident that I would have secured a Supreme Court clerkship if the Justices were not entitled to *four* law clerks. (One of my co-clerks for Justice Antonin Scalia and I used to contend with one another for the ironic honor of claiming to have been the "fourth clerk"—the last one hired.)

To continue with points that I avoid, but to return to my specific topic of career law clerks, I also do not offer some of the stronger criticism occasionally leveled at the use of these clerks—such as that the phenomenon amounts in some instances at the federal level to an improper delegation of Article III power or that, similarly at the state level, over-empowered law clerks can be said to be exercising an authority that the people did not confer on them, by election or otherwise. I think such criticism to be fair commentary, but I do not know how persuasive it is, and I do not adopt it here. And no doubt there is more nuance to the situation than I have been able to sketch out: for example, in the event that a secretarial position has been replaced by an additional law clerk (as is the case in some judicial chambers of the past twenty years), some of my critique is inapposite (though not all of it).

I appreciate as well that, at the federal level, the problem already has been addressed, *to an extent*, by the 2007 policy change that prohibits federal judges from having more than one career law clerk (subject to grandfathering) and that limits term clerks to serving no more than four years.[5] The "to an extent" phrase, however, is an important qualifier,

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> institution. It requires something more than a Judge sitting on the bench to constitute a Court. It requires, in addition, the existence of conditions authorizing the exercise of the powers of a court. It requires the presence of that upon or over which the powers of a court may be exerted, namely, a controversy involving legal or human rights. It requires the presence of litigants, generally attorneys, usually officers, such as bailiff, clerk, etc., and frequently jurors. To constitute a court, some of these elements must concur with the presence of a presiding judge.

Id. at 7, 211 N.W. at 929.

5. JUDICIAL CONFERENCE, *supra* note 1, at 26.

not only because there are many judges outside the federal system but also because even one career law clerk per federal judge would seem a system posing many—though not all—of the problems that prompt my concern and remarks. I note as well that the policy change, as I understand, was driven by budgetary concerns[6]—another point that I do not adopt for myself.

At the same time, I do not wish to be *too* agreeable here. Thus, I want to withdraw my earlier stipulation that an experienced clerk enables a judge to discharge his or her work more efficiently. Certainly, that *can* be the case. Yet it seems to me that the culture of the chambers of a judge with career law clerks suffers from not having the hunger or energy that a newly minted lawyer can bring. In this regard, career law clerks can introduce *in*efficiency.

Nonetheless, at the end of the day, my purpose is not to criticize but perhaps to engender some self-reflection or even further conversation.[7] I have, so far as I can recall, never criticized a single judge for a specific law clerk hiring decision—i.e., the decision to hire or not to hire a particular person—and, if I ever have, I was wrong to do so. The question as to who is a good fit with a particular judge is an individual one, even idiosyncratic in its nature, and it is committed to someone other than me. I appreciate as well that there may be more to be said in defense of the phenomenon of career law clerks. For example, such

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6. *Id.*

7. With respect to career law clerks, the public record reveals little along these lines. There is the robust defense of career law clerks offered by one senior district judge in Nebraska, who maintains a blog about "the role of the federal trial judge." *See* Richard G. Kopf, *No Rookies: The Inestimable Value of Career Law* Clerks, HERCULES AND THE UMPIRE (March 20, 2013), http://herculesandtheumpire.com/2013/03/20/no-rookies-the-inestimable-value-of-career-law-clerks/, *archived at* http://perma.cc/N79M-KAL3. This judge is not known for the nuanced views on his blog. *See* Jonathan H. Adler, *A Judge Who Should Heed His Own Advice*, VOLOKH CONSPIRACY (July 7, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/07/a-judge-who-should-heed-his-own-advice/, *archived at* http://perma.cc/YMG6-95B3. Yet he does directly engage with some of the critiques of career law clerks. For example: "For those who say that judges have an obligation to train fledgling lawyers and hiring recent law graduates as short term clerks meshes with that training obligation, I say nuts. Our job, at least at the trial level, is to be judges and not something else." Kopf, *supra*. I do not share this view: I think that the legal profession has long recognized, in a variety of contexts, the appropriate teaching or training role of judges. Indeed, even if I would not go so far as to term it an "obligation," I believe this role to be among the things that help make the law a *profession*. To move beyond this judge's view, for a *defense* of at least the limitation of federal judges to one career law clerk, see William H. Pryor Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 FLA. L. REV. 1007, 1024–26 (2008); see also Anne C. Conway, *Later Impressions*, LITIGATION, Spring 2002, at 3, 4 (discussing author's use of both career and term clerks during her first ten years as a United States district judge).

clerks may be especially helpful to federal judges who have assumed senior status and who nonetheless perform valuable judicial work. Of course, to say this is not to say that these benefits outweigh the costs, some of which this essay has identified.

In all events, I think that we should worry about a system in which a law clerk serves for a judge's career (or even much of it). At the trial level, this seems to me to reflect the "judge as case manager" philosophy that has affected other aspects of our judicial system, often negatively. I have previously spoken to that in critiquing the "culture of default" that I think to have begun to develop in the Wisconsin courts in recent decades—that is, the culture in which trial judges have been more willing to enter default judgments and less willing to vacate them than is appropriate in a system favoring resolution of cases on the merits.[8] Judges are more than managers: they are teachers, for both the larger world and those who work with them, and many of them are missing out on important teaching opportunities by excessive reliance on law clerks who will be, outside of the judges' chambers, for the duration of their careers mute and inglorious. In my respectful estimation, our legal system is the poorer for it.

8. Joseph D. Kearney, *Law Schools as Common Ground for Discussion*, MARQ. LAW., Summer 2010, at 52, 53.